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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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WILLIAM R. BARKER,
201 Wood Street, Lexington, Massachusetts,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case, numbered 104-55 on the records of said court.

OPINION BELOW

The printed opinion of the United States Court of Claims appears in Appendix C hereto, *infra,* page 9a and it is reported in 140 F. Supp. 415.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956 (R. 11-15). Petitioner's motion for reconsideration, rehearing and reference to Commissioner to hear evidence was denied on July 12, 1956 (R. 27). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1255(1).

QUESTIONS PRESENTED

Congress, in 1939, enacted legislation providing for disability retirement pay to officers of the Army of the United States other than those of the Regular Army. Thereafter, Congress established three separate administrative remedies to enable such officers to realize their retirement benefits: (1) A hearing before an Army Retiring Board (1941). (2) A review and a *de novo* hearing by an Army Review Board (1944). (3) A review and a *de novo* hearing by an Army Board for the Correction of Military Records (1951). In each case the findings of the Board were subject to the approval of the Secretary of the Army.

Under the Federal statutes, disability retirement pay is payable monthly.

1. If the six-year statute of limitations governing actions in the United States Court of Claims is applicable, does not the cause of action for retirement pay accrue each month so that only the portion of the pay which became due prior to the six-year statute is barred?

2. Where administrative review of administrative decisions is provided for by statute, and both the review and the original hearing are *quasi*-judicial proceedings, is it not necessary to exhaust the review prior to resorting to the Federal court and is not the statute of limitations tolled pending such review?

3. Where Congress provides a new administrative remedy for claimants who have not been able to obtain relief under existing administrative remedies, does not a cause

of action accrue upon the arbitrary denial of the new remedy?

4. In 1947, shortly after his separation from active duty, an Army Retiring Board finds that an officer is not permanently disabled for military service. In 1950, it ascertains that its previous finding was in error and that the officer had been permanently disabled. Because of this disability, the Army dismisses the officer from the Reserve, thereby finally terminating his military career. Does not his cause of action for retirement pay accrue at the time the Army discovered its mistake and dismissed him from the Reserve for physical disability, but refused to award him retirement pay for that disability or even to grant him a hearing to determine his eligibility therefor?

5. When the Army Retiring Board in 1947 promised the officer he could have a review of his retirement proceedings in five years and the officer seasonably applied for such a review, does not the arbitrary denial of a review give rise to a cause of action?

STATUTES INVOLVED

The statutes involved are:

1. The statute of limitations governing actions in the United States Court of Claims, 62 Stat. 976, 28 U. S. C., Sec. 2501 (Appendix A, page 1a).

2. The Act of April 3, 1939, 53 Stat. 557, 10 U. S. C., Sec. 456, granting non-Regular officers of the Army of the United States disability retirement pay (Appendix A, page 1a).

3. The Act of September 26, 1941, 55 Stat. 734, 38 U. S. C., Sec. 12, in effect, providing for hearings by Army Retiring Boards (Appendix A, page 1a).

4. The Act of June 22, 1944, 58 Stat. 287, 38 U. S. C., Sec. 693i, providing for hearings by Army Review Boards (Appendix A, page 2a).

5. The Act of October 25, 1951, 65 Stat. 655, 5 U. S. C., Sec. 191a, providing for effective hearings by a Board for the Correction of Military Records (Appendix A, page 3a).

6. R. S. 1268, 10 U. S. C. 861, providing for monthly payment of Army pay (Appendix A, page 3a).

STATEMENT

Plaintiff filed a petition in the United States Court of Claims on March 14, 1955 requesting monthly [1] retirement pay by reason of disability incurred in the performance of combat duty as a Reserve Officer in the Army of the United States. (R. 1-4) The jurisdiction of the court was invoked under the Acts of Congress of April 3, 1939, 53 Stat. 557, 10 U. S. C., Sec. 456 and September 26, 1941, 55 Stat. 734, 38 U. S. C., Sec. 12, providing for such retirement pay. (Statutes quoted in Appendix A, page 1a.)

On July 20, 1955, the Government filed a motion for summary judgment (R. 5) asserting that upon the facts alleged in the petition and contained in certain exhibits filed by the Government (R. 5a-5w), the claim was barred by the six-year statute of limitations governing actions in the United States Court of Claims (62 Stat. 976, 28 U. S. C. 2501).[2]

In opposition to this motion the plaintiff filed an affidavit with various exhibits attached (R. 7).[3]

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[1] A fact of great importance in this case, in which the issue is the statute of limitations, is that retirement pay is payable monthly and that, therefore, a new cause of action arises each month. The statutes providing for monthly payment are RS 1268, 10 U. S. C. Sec. 861 (quoted Appen. A., p. 3a) and R.S. 1274, 10 U. S. C. Sec. 865, 971. See 15 Op. Atty. Gen. 442.

[2] The motion was based upon additional grounds which are not pertinent here as they were not ruled upon by the Court of Claims, the court rendering judgment for the Government solely upon the statute of limitations.

[3] Plaintiff also filed a cross-motion for summary judgment contending that the exhibits filed by the Government and the plaintiff demonstrated that there was no genuine issue of fact upon the merits and that plaintiff was entitled to retirement pay.

On May 1, 1956, the court granted the Government's motion for summary judgment and dismissed plaintiff's petition, holding that the statute of limitations barred the plaintiff's cause of action (R. 15).

For the purpose of ruling upon the Government's motion for summary judgment, the facts alleged in plaintiff's petition and affidavit opposing said motion are conceded. Such facts are as follows:

Plaintiff planned to make military service his career. He entered Valley Forge Military College from which he graduated in 1942 at the age of 19 (R. 1, 7a). He was immediately commissioned a Second Lieutenant and put in command of an infantry unit and, after a period of training, was sent to the European Theatre of War where in 1943-4, he participated in the battles and campaigns of Anzio, Naples-Foggia and Rome-Arno (R. 7a, 7b), was promoted to Captain (R. 7a) and was awarded the Distinguished Service Cross and other high decorations (R. 2, 5b).

He was wounded in combat with the enemy and hospitalized on four separate occasions. In November 1943, an exploding shell perforated his left ear drum, causing a loss of hearing therein. He was hospitalized for two weeks (R. 2, 7b, 5j, 5s). In January 1944, a land mine exploded in his face, causing head wounds and injury to his left eyeball. Fragments were imbedded in his skin. He was hospitalized for one month (R. 2, 7b, 5j, 5s). In May 1944, he was struck with rifle fire below the knee and hospitalized five days. In June 1944, he was hit by artillery fire. His left arm was severely fractured and he was hospitalized for two years with complex skin and bone graft operations and considerable surgery on his left thigh and right lower leg (R. 2, 7b, 5j, 5s).

On July 25, 1946, after this long period of hospitalization, he was separated [4] from the active service and transferred to the Reserves to be available for call in Emergencies.

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[4] The word "separated" as used herein means that plaintiff was released from active duty and placed in a status of inactive duty.

Soon after his separation, he was examined by the Veterans Administration which found that his combat injuries had reduced his earning capacity in civilian occupation to the extent of 50 percent (R. 2, 7c).[5]

Because of these findings, he requested and was given a hearing by an Army Retiring Board (R. 7c).[6]

On March 27, 1947, the Board found that plaintiff was not permanently incapacitated for active service and the Secretary approved the finding. The Board informed plaintiff that his claim could be reviewed at any time within five years (R. 7d).

Because the Board found that plaintiff was not permanently incapacitated, he believed that his disability would improve, at which time he could resume his military career (R. 7d). The disability did not improve, however, and the Veterans Administration continued to rate it at 50 percent disabling (R. 7g).

In September 1950, as a result of the National Emergency arising from the Korean incident, plaintiff was recalled to active duty. In October, a physical examination

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[5] The Veterans Administration's criterion for disability compensation was the "reduction in earning capacity" or "the average impairment of earning capacity in civil occupations". (Veterans Administration, Schedule for Rating Disabilities, 1945, p. iii). The criterion for disability retirement pay in the Army of the United States was permanent incapacity for active or general military service, which was defined in the Army regulations as:

> ". . . permanently physically or mentally incapable of performing full military duty, field as well as garrison, in both peace and war." (W. D. Technical Manual 12-245, 1 October 1945, entitled "Physical Reclassification-Retirement and Retirement Benefits for Officers").

[6] In 1941, Congress implemented the basic Act of April 3, 1939, by granting non-Regular officers the right to a hearing by an Army Retiring Board (Act of Sept. 26, 1941, 55 Stat. 734, 38 U. S. C. Sec. 12; RS 1246-1250, 1253, 10 U. S. C. Sec. 961-966; AR 605-250, March 28, 1944; Act of Sept. 26, 1941 is quoted in App. A, p. 1a)

by the Army disclosed that he was, by reason of the identical disabilities which he had at separation and which time had proven to be static, and permanent, unfit for military service (R. 3, 7d). The Army emphasizing its need for Infantry officers, plaintiff attempted to return to active duty. In February 1951 he was again found physically disqualified by reason of his combat injuries (R. 7e, 5j-l). Moreover, the disabilities were found to be of such permanent nature as to disqualify the plaintiff from remaining in the Reserve to which he had been transferred at the time of his separation (R. 7e). This meant a complete termination of plaintiff's military career and he urgently requested a review of his physical condition with permission to remain in the Reserve. After such review, the Army again informed him it had no alternative but to dismiss him from the Reserve (R. 7e), which it proceeded to do in April 1951.[7] A complete orthopedic consultation in Walter Reed General Hospital following plaintiff's additional request for reinstatement again confirmed his physical disqualification by reason of the disabilities he had at separation (R. 7f).

Plaintiff's disabilities having now been found by the Army to have been permanently disqualifying and the Army having terminated his military career by reason thereof, he requested the review of his retirement rights to which the Retiring Board had assured him he was entitled.

In June 1951, the Secretary of the Army rejected plaintiff's application for a reconsideration by the Retiring Board. In March 1952, he rejected an application for a review by the Army Disability Review Board. Both rejec-

[7] Plaintiff was eligible for the Honorary Reserve and was transferred thereto, pursuant to AR 140-120, 20 Feb. 1950, which provided that individuals found to be "permanently physically disqualified for military duty" could not remain in the Active Reserve.

tions were on the ground that these Boards had no jurisdiction to consider plaintiff's claim (R. 3, 7f).[8]

Subsequently, the Secretary advised the plaintiff that the Army Board for the Correction of Military Records had jurisdiction to determine his eligibility for retirement pay (R. 7g).[9] Accordingly, plaintiff, in February 1952, filed an application with this Board (R. 7g), which was denied, without even affording plaintiff a hearing, in May 1954 (R. 3, 7g). Plaintiff filed suit in the Court of Claims in March 1955 (R. 1).

The Court of Claims held that plaintiff's cause of action accrued in 1947, when the Secretary approved the Army

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[8] In 1944, Congress enacted a second administrative remedy to implement the basic Act of April 3, 1939, a hearing by a Review Board. The statute provides in effect, for both a review of Retiring Board decisions and a *de novo* hearing in which evidence of facts which occurred subsequent to the original decision was admissible (Act of June 22, 1944, Servicemen's Readjustment Act of 1944, Sec. 302, 58 Stat. 284, 38 U. S. C. 693i; Appen. A, p. 2a; *Robertson* v. *Chambers*, 341 U. S. 27, 1951.

Although plaintiff had, in 1947, been assured a review, his application was now rejected on the basis of an administrative ruling that the Review Board had jurisdiction only when the officer's record showed he had been separated "for physical disability". In a similar case, the Court of Claims recently held such ruling to be erroneous (*Vaughn* v. *U. S.*, C. Cls. No. 355-54, decided July 12, 1956).

The rejection of plaintiff's application for a reconsideration by the Retiring Board was on the ground that the Board's action had become final and it had lost jurisdiction. This position was inconsistent with the Army's practice of reopening Retiring Board proceedings in cases where the officer had been awarded retirement pay on the basis of newly discovered medical evidence (*Carlin* v. *U. S.*, 121 C. Cls. 643, 100 F. Supp. 451, 1951; *Spencer* v. *U. S.*, 121 C. Cls. 558, 100 F. Supp. 444, 1951.

[9] In October 1951, Sec. 207 of the Legislative Reorganization Act of 1946 was amended to provide an effective remedy through proceedings before an Army Board for the Correction of Military Records with jurisdiction, subject to approval by the Secretary, to correct errors and remove injustices. Act of October 25, 1951, 65 Stat. 655, 5 U. S. C. Sec. 191a. (Statute quoted in Appen. A, p. 3a). This was the *third* administrative remedy enacted by Congress implementing the Act of April 3, 1939.

Retiring Board's findings and was barred by the six-year statute of limitations (R. 15).

REASONS FOR GRANTING WRIT

Importance of Federal Question

The question in the instant case is involved in numerous claims for retirement pay for disabilities incurred by military officers in World War II, many of whom, like plaintiff, were severely wounded in combat. The magnitude of these claims is evident in a 1948 Congressional hearing and report showing that out of approximately 1,000,000 non-Regular and warrant officers in the Armed Services, about 100,000 were in hospitals, as the result of disabilities, at the time of their separation. (Report of Investigation of Physical Disability Retirement of Officers of the Army, Navy and Marine Corps, Legal Subcommittee, Committee on Armed Services, House of Representatives, 1948, p. 6042.) [10] Many of these officers filed claims for retirement pay with the Armed Services and have been pursuing the administrative remedies provided by Congress.[11]

Under the decisions of the Court of Claims in the instant case and others, these officers will be deprived of the opportunity to have their claims considered by an independent judicial tribunal merely because they did not resort to that tribunal before their *quasi*-judicial remedies within the Armed Services were exhausted.

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[10] During the vast demobilization of 1944-1946, there were in the Army alone 99 Retiring Boards before whom appeared 85,000 officers (Testimony, Maj. Gen. Dahlquist, Hearings before the Legal Subcommittee of the Committee on Armed Services, 80th Congress, 2nd Session, pursuant to H. Res. 141 and H. Res. 447, Investigation of Disability Retirement Systems in the Armed Services.)

[11] The three remedies of 1941, 1944, and 1951 are referred to in Footnotes 6, 8, and 9, *supra*, and are described in detail on pp. 11-12 and footnote 15, *infra*.

It is extremely doubtful that any of these officers knew that they could litigate a claim against the "Army" in any court of law. The Army never so advised them and, if they had such knowledge, they naturally would not have resorted to the court until they had proceeded before the *quasi*-judicial boards within the Army established under the law for this purpose and to which the Army itself referred them.

The question is important not only because of the magnitude of the claims affected, but because the decisions of the Court of Claims make it impossible for many officers to obtain retirement pay concededly due them and of which they have been deprived by admitted mistakes and proven discrimination, injustice, and arbitrariness on the part of the Armed Services.[12]

It is a matter of public knowledge that for many years the Reserve and non-Regular officers of the Armed Services have struggled to obtain equal benefits with the Regulars. One of the fields of battle in this historic conflict has been disability retirement pay which the non-Regulars obtained from Congress in 1939 only after long and strenuous resistance on the part of the Regulars. (Report of House Legal Subcommittee, *supra*, p. 6023; Hearings, supra, p. 143). After the 1939 Act was passed, the Armed Services succeeded in circumventing it in various ways and

[12] These mistakes and injustices were demonstrated in the 1948 Congressional Hearings, *supra*, p. 9. They are described in detail, in Appendix B, p. 4a and footnotes 13 and 14, p. 11. An illustration of a concededly meritorious claim barred by the statute of limitations is *Girault* v. *U. S.*, C. Cls. No. 50474, decided on Motion for Rehearing Nov. 8, 1955, in which the Court goes to unusual lengths in describing the injustice and arbitrariness of the administrative decision and the great merit of the claim, but concludes that the statute of limitations was not tolled by the review proceedings and that the doctrine of continuing obligation did not apply. Judge Madden, dissenting in a later case, refers to the Girault and similar decisions as "evil" and as having done "harm" which should be undone by over-ruling them (*Gordon* v. *U. S.*, C. Cls. No. 106-55, decided April 3, 1956, quoted p. 19, *infra*).

the non-Regulars appealed to Congress for administrative remedies to enable them to realize the benefits Congress intended them to have.

The first remedy was enacted in 1941 when the non-Regular officers were assured Retiring Board hearings (App. A, p. 1a, Footnote 6, *supra*). This legislation did not afford the non-Regulars the protection intended[13] and they again appealed to Congress which, in the 1944 "G. I. Bill of Rights", enacted an additional administrative remedy, the "Review Board" hearing (See Footnote 8, *supra*).

This remedy did not rectify the situation and, in 1948, the non-Regular officers demanded and received a thorough investigation by a Committee of the House of Representatives. In this investigation, an abundance of proof was offered demonstrating that these officers had been deprived of retirement pay, not only by reason of admitted mistakes, but arbitrary and discriminatory conduct. The investigating Committee so reported to the Congress.[14]

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[13] From August 31, 1940 through November 30, 1942, of over 4,000 Reserve and National Guard officers who came before Army Retiring Boards, only 65 were granted retirement, an astonishing figure in view of the fact that an officer could not appear before a Retiring Board until he was found disabled after a thorough screening at an Army hospital and after appearance before a Disposition Board of three medical officers. (Testimony of Col. C. M. Boyer, Assistant to Executive Director, Reserve Officers Association, Hearings, *supra*, p. 171.)

[14] The Hearings and Report of the Subcommittee have been adverted to on p. 9 and footnote 10, *supra*. The mistakes arose out of the magnitude of the demobilization. In the Army alone 600,000 out of a total of 800,000 officers, plus the bulk of 8,000,000 enlisted men, had to be demobilized in 1½ years (Hearings, *supra*, pp. 5-12). The Retiring Boards, the Army Medical witnesses and the Disposition Boards were inexperienced (*Ibid.*). There were no physical standards for retirement, creating additional confusion and inequalities (Hearings, pp. 58, 165, 253). Everyone, patients and doctors, were in a rush to get home. The Army admitted that it made many mistakes and that many were not retired who should have been (Report, *supra*, p. 6032).

Moreover, it was frequently impossible to determine at the time

In 1951 Congress enacted new legislation providing for an additional remedy through the Board for the Correction of Military Records (App. A, p. 3a).[15]

All three remedies have proven inadequate, perhaps for the reason that neither the Retiring Board, Review Board nor Correction Board are independent tribunals. They all consist of employees of the Armed Services and as such cannot be considered entirely independent in their judg-

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of separation whether the disability was permanent or would improve. Only time could provide the answer. (Report, p. 6042).

In addition to the difficulties implicit in the magnitude of the workload and in the nature of the facts to be determined, a far more serious factor causing denial of retirement pay was the arbitrariness, unfairness and injustice of the Armed Services in administering the retirement statutes. The Hearings are full of proof of all kinds of injustices and discrimination against non-Regular officers. The investigating committee, in its report, makes findings thereof and expressly condemns certain practices. Examples of this reprehensible conduct are contained in App. B, p. 4a).

[15] The remedies of 1944 and 1951 were established not only to provide new hearings because of the injustices theretofore suffered by the officers in hearings which they had had. Their purpose, also, was to provide a hearing where, according to rulings of the Comptroller General and Judge Advocate General, they were prohibited. Under these rulings, actions taken by the Secretary upon findings of the Retiring Boards were final and could not be reopened or reconsidered even in cases where it was obvious that mistakes were made or it was impossible to determine the extent or permanence of the disability at the time of the hearing. This was one reason why the 1944 statute provided for *de novo* hearings by the Review Board. In addition, the Comptroller General had ruled that after the enactment of the Career Compensation Act in 1949, *63 Stat. 802, 37 U. S. C., Sec. 272*, officers who had been separated from the Army without processing for retirement, were not entitled to a Retiring Board hearing even though it was indisputable that they were permanently incapacitated at the time of separation. (*Updike* v. *U. S.*, 132 F. Supp. 957, C. Cls. 1955). Rulings of the Comptroller General also deprived many officers from obtaining a Review Board hearing. (*Vaughn* v. *U. S.*, C. Cls. No. 355-54, decided July 12, 1956). One of the purposes of the 1951 statute was to provide a remedy in cases in which, by reason of the above rulings, the officer had been held not entitled to a hearing, a condition precedent to retirement.

ment or immune from influence. In the statute establishing the Correction Board, a step forward was made by precluding military officers from serving on this Board as they did on the Retiring and Review Boards and by providing that only civilians could act as members thereof. But the civilians were still employees of the Armed Services. (See criticisms of Army Correction Board in Disabled American Veterans' "Semi-Monthly," Sept. 9, 1952, Sept. 29, 1953, May 31, 1954, Sept. 27, 1955; D. A. V. Annual Service Report on Military and Naval Affairs, Aug. 19, 1956).

Congress provided liberal periods of time for the exercise of the administrative remedies. The 1944 statute, which established the Review Board proceeding, permitted its exercise within 15 years from the action taken pursuant to the original Retiring Board decision. The 1951 statute, which made effective the Correction Board proceeding, permitted claims to be filed within 10 years from the date of the statute or 3 years of their discovery by the claimant, whichever was later, with authority given to the Board to waive this limitation in the interest of justice. A determined attempt to include a strict statute of limitations in the bill was rejected by Congress. (Hearings of Subcommittee of House Committee on Armed Services, on H. R. 1181, 82nd Congress, pp. 366, 272-73).

The Court of Claims has, in effect, held that Congress intended that the utilization of this liberal time to pursue his administrative remedies should bar the disabled officer from resort to the only independent tribunal available to him. To ascribe such an intent to Congress, which would virtually vest in the Army an absolute discretion in all claims for compensation for disability suffered in the last war, hardly seems possible in view of the fact that Congress was informed of the many injustices endured by the non-Regulars in the Army's administration of these claims.

The legislative history of the Act of 1951 negates such an intent for Congress expressly rejected a determined effort to bar the Federal courts from reviewing the decisions of the Correction Board. Both the Subcommittee of the House Armed Services Committee and the full Committee stated, in their reports, that the Federal courts should have the right to review. (House Report No. 449, 82nd Congress, May 10, 1951, pg. 3; Hearings on H. R. 1181, 82nd Congress, Committee on Armed Services, p. 450; Hearings of Subcommittee, pp. 377, 392).

If Congress intended the statute of limitations to bar the claims, the action of Congress in preserving the right of review by the Federal court would have been meaningless because six years had already elapsed from the 1944-1946 period when the Retiring Boards had made practically all of their initial decisions.

The determination, by this Court, of the questions involved herein is important, not only because it will affect the existing claims of thousands of disabled officers, but also because it will determine the procedure to be followed in the future. Under the present decisions of the Court of Claims, disabled officers will by-pass the administrative remedies within the Armed Services, excepting the initial one of the Retiring Board, and go directly to the Court of Claims. It will make the 1944 and 1951 statutes superfluous and impose an unduly heavy burden on the Court of Claims to determine technical, medical questions which should first be determined in the review proceedings which Congress has provided.

The Ultimate Issue in the Case Has Never Been Decided By This Court and the Decisions of the Court of Claims Are Inconsistent and Conflicting With a Sharp Division Among the Members of That Court

This Court has never decided the ultimate question in this case,—when does the statute of limitations bar claims for disability retirement pay.

In *Odell* v. *U. S.*, 135 F. Supp. 539, C. Cls., decided Nov. 8, 1955, the court (speaking through Madden, J.) states that under the prevailing Supreme Court decisions, the administrative remedies must be exhausted before resort to the Court, but that:

> "Our attention has not been called to any case in which the Supreme Court was required to determine whether a Statute of Limitation was tolled during the time consumed in the exhaustion of administrative remedies."

The decisions of the Court of Claims are so inconsistent and conflicting that it is impossible for counsel to determine whether or not a given claim has been barred. To compound the confusion, there is a sharp conflict among the five members of the Court on various aspects of the question.

The uncertainty of the Court of Claims as to the law was admitted by the Court itself as late as April, 1956. In *Thompson* v. *U. S.*, 139 F. Supp. 935, C. Cls., decided April 3, 1956, the Army Retiring Board had decided the claim in 1944, the Review Board in 1951. The legal question was thus the same as in the instant case and in a number of cases previously decided,[16] whether the six year period began upon the Retiring Board (1944) or Review Board (1951) decisions. The Government raised the question of statute of limitations for the first time after all the evidence had been admitted and the proof closed. Expressly referring to the question of limitations, the Court said (Whitaker, J.):

> "Since in this sort of case this is a judicial question we should have considered this at the outset, *but since it raises controversial legal questions about which*

[16] *Duff* v. *U. S.*, 135 F. Supp. 527, C. Cls., decided Nov. 17, 1955; *Odell* v. *U. S.*, 135 F. Supp. 539, C. Cls. Nov. 8, 1955, on rehearing 139 F. Supp. 749, April 3, 1956; *Girault* v. *U. S.*, 135 F. Supp. 521, C. Cls., Nov. 8, 1955.

there is some uncertainty . . . we have not discussed this issue." (Emphasis ours).

The decisions of the Court of Claims have been inconsistent with each other and in conflict with at least one decision of the Federal District Court. The inconsistency has occurred in each of the three basic questions involved in the statute of limitations:

1. When does the cause of action accrue?

2. Must the administrative remedies be exhausted?

3. Is the obligation to pay disability retirement pay a continuing one, that is, does a new cause of action for such pay accrue each month?

Accrual of Cause of Action. In *Uhley* v. *U. S.*, 128 C. Cls. 608, 121 F. Supp. 674, June 8, 1954, and *Capps.* v. *U. S.*, 137 F. Supp. 721, C. Cls., Jan. 3, 1956, the Court held that the cause of action does not accrue automatically upon separation but only when one of the Boards determines the underlying facts of incapacity and line of duty and the finding is approved by the Secretary. However, in *MacFarlane* v. *U. S.*, 140 F. Supp. 420, C. Cls., April 3, 1956 and *Seabrook* v. *U. S.*, 140 F. Supp. 787, C. Cls, May 1, 1956, it is indicated that the cause of action accrues on separation without any Board hearing.

There is a conflict among the members of the Court as to whether, in cases where the officer is not permanently incapacitated at the time of separation, but becomes so at a later time as a result of disease or injury incurred in the service, a cause of action accrues at the time the officer becomes disabled. The majority of the Court holds that the disabled officer has no cause of action whatsoever unless he is permanently incapacitated at the time of separation. Two of the Judges believe that the officer should not be denied retirement pay merely because the injury or disease has not actually become incapacitating at the time

of separation and that the cause of action accrues at the time he becomes disabled. (*MacFarlane* v. *U. S.*, 140 F. Supp 420, C. Cls., April 3, 1956; *Palluconi* v. *U. S.*, C. Cls. No. 420-54, decided June 6, 1956).

Exhaustion of Administrative Remedy. In a number of cases the Court has stated, as in the instant case, that after a Retiring Board decision, the pursuit of the remedy before the Review Board and/or the Correction Board and arbitrary decisions by these latter Boards, neither toll the statute of limitations nor create new causes of action. (*Soukaras* v. *U. S.*, 140 F. Supp. 797, C. Cls., May 1, 1956; *Odell* v. *U. S., supra; Duff* v. *U. S., supra; Girault* v. *U. S., supra.*)

However, the court has indicated that if the decision of the Correction Board is arbitrary, either the statute of limitation would be tolled or a new cause of action would accrue at the time of the decision. (*Rosnick* v. *U. S.*, 132 C. Cls. 1, 132 F. Supp. 478, 4/5/55 and 7/12/55.) And the court has held that a decision of the Review Board created a new cause of action, refusing to bar the claim on the ground that the Retiring Board decision had been made before the six-year period (*Capps* v. *U. S., supra.*)

In *Odell* v. *U. S., supra,* the court (Madden, J.) indicated it was necessary to exhaust the administrative remedy before prosecuting a claim in the Court of Claims but that such procedure did not toll the statute of limitations. In *Cuiffo* v. *U. S.*, 131 C. Cls. 60, March 1, 1955, however, the court stated through Whitaker, J., that if it were necessary to exhaust the administrative remedy, the statute of limitations would be tolled. Finally, contrary to *Odell, supra,* the Court said in *Duff, Girault* and *MacFarlane, supra,* that it was not necessary to exhaust any administrative remedies after the first Board hearing. These decisions are squarely in conflict with the decision of the United States District Court for the District of Columbia in *Randolph* v. *U. S.*, 69 F. Supp. 156, 1946, holding (prior

to the time the Correction Board remedy became effective, but after the establishment of the Retiring and Review Board remedies) that it was necessary to exhaust not only the initial remedy with the Retiring Board but the remedy with the Review Board before resorting to the Federal court.

Continuing Obligation. In the instant case, as well as in others, the court has held that retirement pay is not a continuing obligation with a new cause of action accruing monthly. (*Odell* v. *U. S., supra; Girault* v. *U. S., supra; MacFarlane* v. *U. S., supra; Field* v. *U. S.*, C. Cls. No. 525-53, 1956.) These holdings are squarely in conflict with its decision in *Seabrook* v. *U. S., supra,* and a long series of decisions in analagous cases over a period of eighty years. Some of these cases are cited in Judge Madden's dissent in *Odell* v. *U. S., supra,* decided on rehearing, April 3, 1956. They include *Ellsworth* v. *U. S.*, 14 C. Cls. 382, affirmed 101 U. S. 170 (yearly installments of compensation as Collector of Customs); *Watson* v. *U. S.*, 21 C. Cls. 511, affirmed 130 U. S. 80; *Moore* v. *U. S.*, 76 C. Cls. 753, etc., etc. In his opinion Judge Madden stated:

> "The plaintiff, having been disabled in military service, became entitled to an annuity, payable in periodic installments, for the rest of his life. By his delay in bringing suit, he lost as many of those installments as became due and payable more than six years before he filed his suit. The court holds that he has also lost all of the other installments for the rest of his life, although they were not due and payable more than six years before he filed his suit. This conclusion is obviously unjust and is, I think, erroneous. (Citations)
>
> In all these, and many other cases, this court has held that those installments of the claim which became due and payable more than six years before suit was filed were barred, but that other installments not so due were collectible. In recent years we have, in a few cases, departed from this orthodox and correct rule. The results, in some cases shockingly unjust,

should have put us on our guard, but did not. In Hunter Louis Girault v. United States, No. 50474, decided November 8, 1955, we found that the action of the Secretary of War was 'clearly contrary to the law', yet we allowed his illegal action to deprive a soldier of his legal rights for the rest of his life. Such an unworthy end is not a reason for inventing a novel and unorthodox legal doctrine.

I am unable to understand the court's reasoning in the instant case. In part it seems to say that an officer is entitled to retired pay only if the Secretary of War awards it to him. But in all of our cases involving retired pay, the Secretary has not awarded the retired pay sought. If he had done so, the case would not be here. The cases come here because, it is asserted, the Secretary has illegally denied retired pay which the statutes and the regulations have awarded. I see not the slightest difference between the legal right of a soldier to his retired pay and the legal right of a civilian employee of the Government to his statutory salary. In either case, if he does not get it, it is because some superior in the Government misapplied the law, or acted without evidence, or arbitrarily. If a landlord, or the owner of an annuity policy, or a civilian employee of the Government, delays in bringing suit, he loses those installments of his claim which are too old, but he does not lose all. I can imagine no reason why soldiers should be selected as the sacrificial offerings to nourish a novel legal doctrine."

In *Gordon* v. *U. S.*, 140 F. Supp. 263, C. Cls., April 13, 1956, the Court of Claims held, inconsistently with the foregoing decisions, that longevity retirement pay is a continuing obligation. The majority sought to distinguish its conflicting decisions on the ground that where there are no controversial factual questions involved, but merely a legal question, retirement pay *is* a continuing obligation. In his concurring opinion, Judge Madden, after adverting to this "novel" doctrine, stated:

"When a court originates a new doctrine, it does so because there is an evil to be cured. The evil which

has given rise to this doctrine is not difficult to identify. The court has adopted another novel doctrine, *viz.*, that an officer entitled to retirement with an annuity for life is deprived of that annuity for all the rest of his life if he neglects to file his suit for it within six years of the time of his release from active duty. Having applied this doctrine in a number of cases, we, quite naturally have not been pleased with the results. See, *e.g.*, Hunter Louis Girault v. United States, No. 50474, decided November 8, 1955; Courtney J. Odell v. United States, No. 145-55, this day decided.

The treatment of the statute of limitations in the instant case is an effort to undo a part of the harm done by our recent decisions. I would undo all of that harm by overruling those decisions. Instead of inventing a new doctrine to partly neutralize the harmful effects of another newly invented doctrine, I would discard both and again acquire the freedom to decide all the cases of this type as they could and should have been decided according to the law as it has been for decades."

Thus the Court of Claims is sharply split on various phases of the statute of limitations and particularly on the question of continuing obligation. Only this Court can resolve the conflicts, uncertainty and doubt resulting from these decisions.

The Decisions of the Court of Claims Upon the Question of Continuing Obligation and Exhaustion of Administrative Remedies Are in Conflict With the Decisions of This Court

The decision in the instant case and others of the Court of Claims, holding that retirement pay is not a continuing obligation, is in conflict with the following decisions of this Court:

1. *U. S. v. Ellsworth*, 101 U. S. 170, which affirmed the Court of Claims decision in 14 C. Cls. 382 holding that plaintiff's claim for annual installments of compensation as a Collector of Customs was a continuing obligation, that each annual installment constituted a new cause of action

and only those which accrued prior to the six-year period were barred.

2. *U. S.* v. *Watson,* 130 U. S. 80, 1889, affirming the decision of the Court of Claims, 21 C. Cls. 511, that monthly longevity retirement pay is a continuing obligation and only that which accrued prior to the six-year period is barred.

3. *U. S.* v. *Moser,* 266 U. S. 236, 1924, affirming 58 C. Cls. 164, holding that plaintiff could recover longevity retirement pay for the period of six years prior to the filing of his suit, although the pay originally accrued in 1904, approximately 20 years before.

The decisions of the Court of Claims that the administrative remedies need not be exhausted is in conflict with *Gusick* v. *Shilder,* 340 U. S. 128, 131, 132 and *U. S.* v. *Sing Tuck,* 194 U. S. 161. In citing these two cases, Judge Madden in *Odell* v. *U. S., supra,* said:

> "The Supreme Court of the United States has repeatedly held that one must first exhaust his administrative remedies in order to maintain a suit in court. A recent case is Gusick v. Shilder . . . and in U. S. v. Sing Tuck . . . the court held that even though Congress has not made the exhaustion of administrative remedies a condition of the right to sue in court, if Congress has made available an administrative remedy, one must exhaust it before he can resort to the courts."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 21, 1956.

APPENDIX

APPENDIX A

Statutes

Statute of Limitations, 62 Stat. 976, 28 U. S. C., Sec. 2501:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues."

Act of April 3, 1939, 53 Stat. 557, 10 U. S. C., Sec. 456:

"Provided further, That all officers, warrant officers, and enlisted men of the Army of the United States, other than the officers and enlisted men of the Regular Army, if called or ordered into the active military service by the Federal Government, for extended military service in excess of thirty days, and who suffer disability or death in line of duty from disease or injury while so employed shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same pensions, compensation, retirement pay, and hospital benefits as are now or may hereafter be provided by law or regulation for officers and enlisted men of corresponding grades and length of service of the Regular Army."

Act of September 26, 1941, 55 Stat. 734, 38 U. S. C., Sec. 12:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Reserve officers, Army of the United States, who were called or ordered into the active military service by the Federal Government for extended military service in excess of thirty days on or subsequent to February 28, 1925, other than for service with the Civilian Conservation Corps, and who are now disabled from disease or injury contracted or received in line of duty while so employed, shall be deemed to have been in the active military service during such period and shall be in all respects entitled to receive the same retirement pay and hospital benefits as are

now or may hereafter be provided by law or regulation for officers of corresponding grades and length of service of the Regular Army.

Sec. 2. That the duties, powers, and functions incident to the administration and payment of the benefits herein provided are hereby vested in the Veterans' Administration: Provided, That in the administration of the retirement pay provisions of the said statute the determination of all questions of eligibility for the benefits thereof, including all questions of law and fact relating to such eligibility, shall be made by the Secretary of War, or by someone designated by him in the War Department, in the manner, and in accordance with the standards, provided by law or regulations for Regular Army personnel: And provided further, That no bounty, back pay, pension, or allowance shall be held to have accrued prior to the passage of this Act."

Act of June 22, 1944, 58 Stat. 287, 38 U. S. C., Sec. 693i:

"Sec. 302. (a) The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released to inactive service, without pay, for physical disability pursuant to the decision of a retiring board, the findings and decision of such retiring board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the retiring board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of the retiring board shall be transmitted to the Secretary of War, the Secretary of the Navy, or the Secretary of the Treasury, as the case

may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after the effective date of this Act, whichever is the later."

Act of October 25, 1951, 65 Stat. 655, 5 U. S. C., Sec. 191a:

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and correction so made shall be final and conclusive on all officers of the Government except when procured by means of fraud: Provided, That procedures set up by the Secretaries of the Army, Navy, and Air Force in accordance with this subsection shall be approved by the Secretary of Defense; Provided further, That no corrective action shall be taken under this subsection unless the request therefor be filed by claimant, his heirs at law, or legal representatives within three years after his or their discovery of the alleged error or injustice, or within ten years after the date of enactment of this section, whichever be the later: Provided further, That the failure to file the request by claimant, his heirs at law, or legal representative, within three years after his or their discovery of the alleged error or injustice may be excused by such board of civilian officers or employees of the respective Departments upon finding by it that it is in the interest of justice to excuse such failure to file within the prescribed time in which event action shall be taken in the same manners as if the request had been filed within the three years as prescribed herein."

R. S. 1268, 10 U. S. C., Sec. 861:

"Officers to be paid monthly. The sums allowed to officer for pay, rental allowances and subsistence shall be paid in monthly payments."

APPENDIX B

Mistakes and Injustices Resulting in Denial of Disability Retirement Pay to Non-Regular Officers of the Armed Services as Disclosed in 1948 Congressional Hearings

In the Annual Convention of the Reserve Officers Association of 1946, the following resolution was adopted (Hearings before the Legal Sub-committee on Armed Services, House of Representatives, 80th Congress, 2nd Session, pursuant to H. Res. 141 and H. Res. 447, February-March, 1948, page 161):

"Whereas, many officers of the Reserve Corps, National Guard, and Army of the United States have suffered disabilities incident to their active duty service; and

Whereas, the Congress of the United States, by the act of April 3, 1939 (53 Stat. 557), as amended, provided for retirement pay, and other benefits, in such cases, and

Whereas, the Army Regulations and Technical Manual 12-245 published to implement that act and to provide equality of action between the cases of officers of the Regular Army and officers of the other components, are clear and fair, and

Whereas the provisions of the act and the regulations are being so flagrantly violated by the retiring boards and the office of the Surgeon General of the Army as to nullify and defeat the intent of the act of April 3, 1939, as amended; and

Whereas such action has denied to many officers, not members of the Regular Army, benefits which the Congress provided for them: Now, therefore, be it

RESOLVED, That the Reserve Officers Association of the United States condemns the aforesaid actions of the War Department and demands the immediate discontinuance of discriminatory and illegal denial of the rights of officers of the civilian components of the Army; and be it further

RESOLVED, That the Congress of the United States be requested to investigate all cases which have been decided by retiring boards, fix the responsibility for improper administration, and to provide remedial action in all such cases; . . .".

As a result of the request authorized in the foregoing resolution and other requests, the House of Representatives

appointed a Subcommittee of the Committee on Armed Services to conduct an investigation. The testimony before the Subcommittee showed, among other things, the following injustices resulting in the denial of retirement pay to non-Regular officers:

1. When Retiring Boards recommended retirement of these officers, the Surgeon General frequently returned the proceedings for reconsideration, sometimes four or five or more times, until he obtained denial of retirement (Hearings, pages 85, 143, 72, 133, 304).

In one case, he reversed four Disposition Boards and seventeen medical officers in the field who had actually examined and interrogated the officer (Hearings, page 133). Of the non-Regulars actually retired, 30 percent had been sent back one or more times to the Retiring Boards (Hearings, page 142). The Committee was unable to obtain a figure of the percentage of cases of officers not retired who were sent back to the Retiring Boards (Hearings, page 72). One service organization representative, who had close contact with these matters, testified that such a figure would be "astonishing" (Hearings, page 142). An investigation for the Army Service Forces disclosed that in 1946, 30 percent to 50 percent of the proceedings were returned by the Surgeon General (Hearings, page 85).

2. A double standard was used for Regulars and non-Regulars. Regulars were retired if they were incapacitated for full military service; non-Regulars only if incapacitated for civilian service (Hearings, pages 120-121). This was a plain infraction of the law, "condemned" by the Committee in its Report (Report, page 6034). Disposition Boards were requested not to recommend sending officers to Retiring Boards because the latter were bound by the statutes, whereas the Disposition Boards were not (Hearings, page 120). In the memorandum setting forth the double standard and the request to the Disposition Boards, it was stated:

"We hope (this discussion) will have demonstrated to you the importance of cutting off these cases at Disposition Board level rather than sending them on to the Retiring Boards for decision." (Hearings, 121).

In this way the non-Regular officers were deprived of the fair hearing assured them by the statutes and regulations (R. S. 1253, 10 U. S. C. Sec. 966; W. D. Technical Manual 12-245, 1 Oct. 1945, Par. 20d, p. 49).

3. Star chamber tactics were engaged in at the hospitals. Access to hospital records were denied. Civilian consultation was resentfully granted or summarily refused. Resentment was manifested against private lawyers. Medical witnesses were controlled. They would say one thing to the patient one day and completely reverse themselves before the Board the next day (Hearings, pages 168-69, 176).

4. Whereas 16⅔ percent of the Regular officers were retired, only 3.3 percent of the non-Regulars were (Hearings, page 162). Only 30 percent of the non-Regular officers who appeared before Retiring Boards were retired, as against approximately 100 percent of the Regulars (Hearings, pages 176, 403).

5. Many officers, in a limited duty status, were illegally separated without appearance before a Retiring Board (Hearings, page 117). Many officers were found physically fit with a "waiver" of their disabilities. This device deprived the officer of the exercise of his Review Board remedy which, by administrative construction of the 1944 statute, could be availed of only if the officer were released for physical disability (Hearings, page 263). Doubts were resolved against the officers (Hearings, pages 289, 300).

6. Representative Teague, of Texas, who served on a Retiring Board approximately a year, was one of the most important witnesses before the Committee. He testified fully upon the injustices related above. He stated that many men, who were not retired, should have been; that when his Board made favorable findings, they were frequently re-

turned by the Surgeon General, but never when the findings were unfavorable. Doubts were resolved against the officer by the Surgeon General who controlled the proceedings and had the last word (Hearings, pages 296-304).

The Report of the Subcommittee makes definite findings of serious wrongs committed against the non-Regulars. The committee points out the great disparity between the percentages of Regulars and non-Regulars retired (Report, 6021).

"The administrative procedures followed by the Surgeon General's officers after a case has been processed by an Army Retiring Board prompts us to conclude that discrimination was practiced against the non-Regular officer." (R. 6032)

The committee also stated (Report, page 6032):

"Granting the propriety of an initial disapproval of the Surgeon General in order to effect uniform standards, we cannot agree that the continuing disapproval of the Surgeon General of the same case for as many as four or five times is appropriate. Our only witness with retiring board experience stated that the repeated disapproval of an Army retiring board's recommendation for retirement was ultimately construed to be an order to deny retirement. The end result was that one or two medical officers in the Surgeon General's Office were permitted to overrule and nullify the findings of at least seven other medical officers who had either examined the subject officer or had personal knowledge of his case. Numerous cases have been presented to the committee which involve repeated disapprovals of the medical findings of an Army retiring board by the Surgeon General's Office."

Adverting to the imposition of a double standard in plain violation of the Act of 3 April 1939, the enactment of which the Army "strongly opposed" in the first instance (Report, 6033), the committee said:

"Frankly, we do not know whether the action was the result of inadvertence or prejudice, but it was so improper that we take this opportunity to condemn it." (6034)

The Subcommittee also stated in its report (page 6032):

"In processing such large numbers of cases, it was inevitable that some mistakes did occur, and both the Army and the Navy admit that many mistakes did occur. The best evidence that mistakes were committed lies in the fact that approximately 90 non-Regular Navy officers and 684 non-Regular Army officers have been physically retired by the review boards under section 302 of the Servicemen's Readjustment Act of 1944. None of these officers would now be drawing disability retirement benefits if their sole means of relief had been confined to Army and Navy retiring procedures. We cannot feel that all of these cases were purely mistakes in judgment."

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 104-55

(Decided May 1, 1956.)

WILLIAM R. BARKER v. THE UNITED STATES

Mr. Paul R. Harmel for the plaintiff.

Mr. LeRoy Southmayd, Jr., with whom was *Mr. Acting Assistant Attorney General Joseph D. Guilfoyle,* for the defendant.

On Defendant's and Plaintiff's Motions for Summary Judgment

LARAMORE, *Judge,* delivered the opinion of the court:

Plaintiff, a former officer in the Army of the United States, seeks to recover disability retirement pay from July 25, 1946, when he was relieved from active duty, not by reason of physical disability, to February 18, 1947, when he was recalled to active duty; and from May 14, 1947, when plaintiff was again relieved from active duty, not by reason of physical disability, to date of judgment.

The allegations of the petition, together with the exhibits attached thereto, show the following facts with reference to plaintiff's service record.

Plaintiff was appointed a second lieutenant, Infantry, Officer's Reserve Corps, May 31, 1942; promoted to first lieutenant, Army of the United States, July 17, 1943; promoted to captain, Army of the United States, March 27, 1946; appointed captain, Infantry, Officers' Reserve Corps, March 28, 1946; relieved from active duty on July 25, 1946, "not by reason of physical disability"; appointed first lieutenant, Army of the United States, February 7, 1947, vacating commission as captain, Army of the United States; recalled to active duty February 18, 1947; promoted to captain, Army of the United States, May 8, 1947; relieved

from active duty May 14, 1947, "not by reason of physical disability"; transferred to Honorary Reserve, April 6, 1951; appointed captain, Honorary, United States Army Reserve, November 12, 1952; commission as captain, Army of the United States, terminated April 1, 1953, by operation of law; and plaintiff is now captain, Retired Reserve. He is credited with the following periods of active service as a commissioned officer: June 11, 1942, to July 25, 1946; February 18, 1947, to May 14, 1947; and February 23, 1951, to February 23, 1951. The petition alleges that plaintiff was wounded in combat with the enemy on four separate occasions for which he was hospitalized.

The certificate of the Department of the Army establishes that on March 27, 1947, plaintiff appeared before an Army retiring board which convened at Murphy General Hospital, Waltham, Massachusetts. The finding of the board was: "1st Lt. William R. Barker is *not* permanently incapacitated for active service." Recommendation of the board was: "Full military duty, with a waiver for moderate left ulnar deformity, and mild limitation of supination and pronation, left." These findings were concurred in by The Surgeon General and approved By Order of the Secretary of War on April 24, 1947. On May 14, 1947, plaintiff was thereupon relieved from active duty "not by reason of physical disability," under Special Orders No. 40, dated May 7, 1947.

During the Korean emergency the plaintiff was ordered to one-day active duty for the purpose of undergoing a physical examination, under Special Orders No. 38, dated February 21, 1951. On February 23, 1951, the plaintiff was examined for extended active duty at the U. S. Army Dispensary, Boston Army Base. The medical examiner noted the scarring resulting from a shrapnel wound, the resultant bone graft, and the loss of motion attendant thereto. Based upon the loss of motion, the examiner concluded that the plaintiff was not physically qualified for extended

active duty. Thereafter, on April 6, 1951, plaintiff was transferred from the Inactive Reserve to the Honorary Reserve by reason of being "permanently physically disqualified," pursuant to Special Orders No. 69.

Plaintiff's request to reopen his retirement proceedings was denied by the Department of the Army under dates of June 18, 1951, and April 4, 1952. Plaintiff was advised that authority did not exist for considering his case under the Career Compensation Act of 1949, 63 Stat. 802, and since plaintiff's release from active service was not the result of a retiring or disposition board action, his case was not eligible for review under section 302 of the Servicemen's Readjustment Act of 1944, 58 Stat. 284, 287, as amended, 38 U. S. C. § 693i.

On February 26, 1952, plaintiff filed an application with the Army Board for Correction of Military Records, pursuant to section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended by the Act of October 25, 1951, 65 Stat. 655. Plaintiff's application requested that the action of the retiring board of March 27, 1947, be corrected to show that he was, on the date of initial relief from active duty, incapacitated for active service and entitled to be retired.

On December 5, 1952, the plaintiff was informed by the Adjutant General as follows:

> A thorough examination of your military, medical and Veterans Administration records, together with the information submitted by you, fails to reveal any evidence of error or injustice relative to your separation from active service not by reason of physical disability. In this connection, you did not have sufficient disability on 25 July 1946, to warrant your retirement for physical disability under the rules, laws, and regulations in effect at that time.
>
> The administrative procedures established by the Secretary of the Army for the guidance of the Army

Board for Correction of Military Records provide that an application for a hearing by the Board may be denied when a sufficient basis for review has not been established.

I regret to advise you that careful consideration by the Army Board for Correction of Military Records, of your Army records, together with such facts as have been presented by you, fails to establish sufficient basis for a hearing of your case by the Board. Therefore, in the absence of additional material evidence, no further action on your application is contemplated.

The official records on file in the Office of the Adjutant General further disclose that on September 20, 1953, the plaintiff requested the Secretary of the Army to reconsider his application for correction of his records; and that on October 14, 1953, the plaintiff was informed by the Executive Secretary of the Army Board for Correction of Military Records that his application had again been thoroughly reviewed but a basis for relief had not been established.

Plaintiff continued to protest his separation "not by reason of physical disability." The official records on file in the Office of the Adjutant General disclose that on April 30, 1954, plaintiff was authorized to report to Walter Reed Army Medical Center, "for he purpose of undergoing a complete medical examination, appearance before a Medical Board and if warranted, appearance before a Physical Evaluation Board". Subsequently, for the convenience of the plaintiff, this authority was amended to permit plaintiff to report to the U. S. Army Hospital, Fort Devens, Massachusetts.

On May 20, 1954, plaintiff underwent a thorough medical examination at Fort Devens. The medical examiner noted the following defects:

Left scarred drum

Hypertrophic astigmatism

Left ulnar deformity, mild limitation of supination and pronation

Small scar right knee

Scar right knee (bone graft) vertical 20 cm long

The examiner concluded that the plaintiff was "qualified for General Duty."

On August 25, 1954, plaintiff's case was considered by a board of medical officers. The board, after noting plaintiff's defects in technical medical terms, was required to "State Disability In Nontechnical Language." In response thereto, the board stated as follows:

Loss of some tissue left forearm, moderate limitation of rotation, left forearm; pain in scar in right leg.

The board concluded that the plaintiff was "Not Incapacitated" for military duty and "was capable and is capable of performing general military service in a limited capacity."

Plaintiff has been receiving disability compensation from the Veterans' Administration during the period covered by the present claim.

This case comes before the court on plaintiff's and defendant's motions for summary judgment. The defendant in its motion for summary judgment has raised the question of the statute of limitations, 28 U. S. C. § 2501, which provides in pertinent part as follows:

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

Plaintiff was released from active duty on July 25, 1946, not by reason of physical disability, without retirement pay. On February 18, 1947, plaintiff was recalled to active duty

for the purpose of physical reevaluation, and on March 27, 1947, plaintiff was found by a retiring board qualified for general service with a waiver. This decision was approved by the Secretary of War on April 27, 1947. On May 14, 1947, he was again released to inactive duty without retirement pay. His right of action accrued only when the retiring board acts arbitrarily or otherwise unlawfully. *Odell* v. *United States,* No. 145-55, decided April 3, 1956. It was on this date (May 14, 1947) that plaintiff's cause of action accrued.

Plaintiff's petition was filed March 14, 1955, more than six years after the approval of the retiring board's action by the Secretary of War. Therefore, the claim is barred by the statute of limitations, *supra.*

The fact that administrative proceedings were being pursued during the intervening period between the date of his release from active duty and the filing of his petition, does not aid the plaintiff. This Court on numerous occasions has held that pursuit of permissive administrative remedies does not toll the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Girault* v. *United States,* No. 50474, decided November 8, 1955; *MacFarlane* v. *United States,* No. 294-55, decided April 3, 1956.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

It is so ordered.

WHITAKER, *Judge,* and LITTLETON, *Judge,* concur.

MADDEN, *Judge,* and JONES, *Chief Judge,* concur in the result.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 140 F. Supp. 415.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956. Petitioner's motion for rehearing, timely filed, was denied July 12, 1956, and his petition for a writ of certiorari was filed on September 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the claim of petitioner, an officer in the Army of the United States released from active duty

in 1947 "not by reason of physical disability," is barred by the six-year statute of limitations in the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

STATEMENT

Petitioner held commissions in the Officers Reserve Corps and the Army of the United States, neither of which is a component of the Regular Army, under emergency legislation (Deft. Ex. A). After honorable war service during the course of which he was wounded, petitioner, in common with many officers holding comparable commissions, was demobilized as of July 25, 1946, and reverted to inactive status (Deft. Ex. B).[1] His release to inactive duty was "not by

[1] Commissions in the Army of the United States were issued for the duration of World War II and six months or for a period stated in the commission itself (H. Res. 199, Sept. 22, 1941, 55 Stat. 728, 729). Such commissions were terminable at any time at the pleasure of the President or by Act of Congress. Congress, in fact, terminated these commissions as of July 1, 1948 (Act of July 25, 1947, 61 Stat. 451). Reserve commissions of the type held by petitioner were granted pursuant to Section 37 of the National Defense Act (Act of June 3, 1916, as amended, 39 Stat. 189; 42 Stat. 1033, 10 U. S. C. (1946 Ed.) 352, 358) and were terminated on April 1, 1953. Proclamation 2974, April 28, 1952, 17 F. R. 3813; Section 1 (c) of Emergency Powers Continuation Act, 66 Stat. 333.

reason of physical disability," *i. e.*, petitioner was not released because he was considered unfit to perform the duties of an officer (Deft. Ex. B).

In February 1947, petitioner was recalled to active duty status and assigned to Murphy General Hospital for the purpose of physical examination and appearance before an Army Retiring Board.[2] After this examination and hearing, the Board found that petitioner was not permanently incapacitated for active service and recommended that, if assigned, petitioner be assigned to full military duty with a waiver for mild deformity and limitation of movement in his left arm (Pl. Ex. 3). This finding was concurred in by the Surgeon General and approved by the Secretary of War on April 24, 1947 (Deft. Ex. A).

At the hearing before the Board, petitioner stated that he desired to be relieved from active duty and did not desire to remain on active duty with a waiver (Pl. Ex. 3). On May 7, 1947, petitioner was ordered released to inactive duty in the Reserve (Deft. Ex. C).

By order dated February 21, 1951, petitioner was recalled for one day's active duty for the purpose of undergoing a physical examination preliminary to planned orders for extended active duty in the Korean theater (Deft. Ex. D). The examination thus con-

[2] Army Retiring Boards, at the time here material, were convened pursuant to R. S. 1246, 10 U. S. C. (1946 Ed.) 961, and were charged with the function of determining whether an officer, appearing before the board, was capable of discharging the duties of his office. R. S. 1248, 1249, 10 U. S. C. (1946 Ed.) 963, 964. Access to these boards for non-regular officers was created by the Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456.

ducted resulted in a finding that he was not qualified for extended active duty (Deft. Ex. E, Item 77).[3] Petitioner was thereafter notified that he had the choice of being separated entirely from the service or of being transferred into the Honorary Reserve (Pl. Ex. 4). He was transferred into the Honorary Reserve (Deft. Ex. F; Pl. Ex. 5).

Asserting an inconsistency between the result reached in 1947 and in 1951 as to his physical qualifications as an officer, petitioner thereafter sought on various occasions to obtain an administrative determination that he had been permanently disqualified to serve as an officer since 1946 and was entitled to disability retired pay. These requests were refused by the Army (Deft. Exs. G, H, and J). After formal procedures were utilized, the Army, in 1954, again accorded petitioner a complete physical examination. Petitioner was again found "* * * qualified for General Duty * * *" (Deft. Ex. K). Reviewing the result of this physical examination, a board of medical officers found petitioner "* * * not incapacitated" for military duty and "* * * capable of performing general military service in a limited capacity" (Deft. Ex. L).

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[3] The special factors entering into the selection of officers for extended active duty in battle are obvious, and the negative result reached as to petitioner's qualifications for this purpose are in no way inconsistent with the findings of the 1947 Retiring Board. The 1947 Board recognized that petitioner's usefulness for extended active duty was questionable but that he was otherwise fully qualified (Pl. Ex. 3, pp. 2, 3). At the 1947 hearing, petitioner himself recognized his limitation for purposes of combat duty. *Id.*, p. 4.

This suit was instituted in the court below on March 14, 1955 (R. 1). On the basis of the events set out above, petitioner requested that court to declare him permanently incapacitated at all times since his release from active duty in 1946 and to award him disability retired pay from that date (R. 4). The Government moved for summary judgment, urging that petitioner's cause of action, if any, accrued more than six years before the filing of the complaint and pointing out that the subject matter of the case was committed to the exclusive control of the Army and therefore beyond the jurisdiction of the court (R. 5; Deft. Motion for Summary Judgment). Petitioner also moved for summary judgment (R. 7). The court held that petitioner's cause of action accrued on May 14, 1947, the date on which he was released to inactive duty without entitlement to disability retired pay (R. 11–14).

ARGUMENT

1. Assuming the power of the Court of Claims to review factual determinations of a highly technical nature committed by statute to the discretion of the armed services (see *infra,* pp. 9–11), we think that court correctly held that petitioner's cause of action accrued when he was released to inactive duty pursuant to the 1947 Retiring Board recommendation, approved by the Secretary of War. This holding is in accord with numerous decisions of the Court of Claims on similar questions. See, *e. g., Field* v. *United States,* C. Cls. 525–53, June 5, 1956; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Girault* v. *United*

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States, 135 F. Supp. 521; *Odell* v. *United States,* 135 F. Supp. 539; *Rosnick* v. *United States,* 132 Cls. 1, rehearing denied, 132 C. Cls. 6. In each of these cases, the court has recognized that a claim for disability retired pay matures at the latest when the officer is notified of his release without entitlement to such pay by the Secretary after recommendation by a retiring board.

Concededly, some inconsistent rules appear to have been announced by the Court of Claims in dealing with this general class of cases. But, narrowly construed, many, if not all, of these decisions can be reconciled with the proper rule announced in this case. For example, petitioner relies upon a statement in the *Rosnick* case, *supra,* to the effect that a new cause of action accrues where the decision of a review board is arbitrary, a statement which, of course, would vary the actual period of limitations available to an officer claimant.[4] The *Rosnick* case actually applied the same rule as that governing here and the statement to which petitioner points is dictum. Again, petitioner points to *Capps* v. *United States,* 137 F. Supp. 721, for the same proposition. In the *Capps* case, the court held

[4] It should be noted that the petition in this case contains a naked allegation that the Army Board for the Correction of Military Records "arbitrarily" denied petitioner's application (R. 2). An examination of the record in the case discloses that there could be no substance to this charge. And the Court of Claims itself has recognized that the creation of a cause of action to review arbitrary action is not a mere matter of pleading. See *Rosnick* v. *United States,* 132 C. Cls. 6; *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948.

that a claimant's right to disability retired pay, established by the substitution by the Secretary of War of a corrected regulation under the statute, could not be defeated by a Disability Review Board on second hearing by a reexamination of the original facts of record. The court held that, "under these peculiar facts," a separate claim accrued to review this second erroneous action of the Disability Review Board.[5]

Apart from certain inconsistent *statements,* the Court of Claims has never *held* that a cause of action does not accrue for disability retired pay when an officer is separated from service. Nor has it ever *held* that the statute of limitations is tolled as to the cause of action which thus accrues by the availability to the claimant of a statutory review within the services.[6]

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[5] Again, under peculiar facts, a new cause of action was held, in *Uhley* v. *United States*, 121 F. Supp. 674, to arise to review rejection of a claim for disability retired pay presented for the first time to the Board for the Correction of Military Records. The result of such a decision is inconsistent in effect with the principle applied in the instant case and many similar cases. The Government has not accepted the *Uhley* decision (which was interlocutory) nor does it agree that the actions of Disability Review Boards or of the Board for the Correction of Military Records are ordinarily reviewable. Cf. the Court of Claims decisions in *Carlin* v. *United States*, 100 F. Supp. 451; *Spencer* v. *United States*, 102 F. Supp. 774, certiorari denied, 344 U. S. 828, and the Government's brief in opposition in *Spencer*, No. 164, Oct. Term 1952, at pp. 5 *ff*.

[6] The Court of Claims has itself recognized the extreme results of any such holding. It should be remembered that, in proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693 (i). Again, application to the Board for the Correction of Military Records may be made within three years after date of dis-

On the contrary, it has consistently held that the availability of administrative remedies does not toll the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Duff* v. *United States,* 135 F. Supp. 527; *Girault* v. *United States,* 135 F. Supp. 521; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Soukaras* v. *United States,* 140 F. Supp. 797.[7]

The short of the matter is this: Here, as in all similar cases, whatever claim petitioner had accrued in 1947 when he was released to inactive duty without entitlement to disability retired pay. His rights, if any, were fixed at that time and nothing in the permissive statutory review system available to him within the Army tolled the running of time on the judicial assertion of his rights.[8] Accordingly, the de-

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covery of the alleged error or injustice or ten years after date of enactment of the statute creating that Board. 5 U. S. C. 191 (a). Recognizing these time factors, the Court of Claims said, in *Odell* v. *United States*, 135 F. Supp. at p. 541: "* * * But we think that Congress did not, by this provision, intend that cases might be brought in this court 21 years after the pertinent facts had occurred."

[7] There is no need to discuss petitioner's reliance on the district court opinion in *Randolph* v. *United States*, 69 F. Supp. 156 (S. D. Tex.), erroneously shown in the petition for certiorari as arising in the District of Columbia. The *Randolph* case, affirmed on appeal, 158 F. 2d 787 (C. A. 5), has no connection with the problem of exhaustion of remedies or the impact of that doctrine in tolling the statute of limitations. The case held that a district court suit for an officer's disability retired pay was an unconsented suit against the United States and was not within the scope of the Tucker Act since it was a suit for a "pension."

[8] It should be observed that the Court of Claims has never dismissed a case of this type for prematurity where it appeared that the officer claimant had not invoked the internal service mechanism for review, another indication of the position of the Court of Claims that such remedies are purely permissive.

cision below is correct and in accord with the settled law, and there is no occasion for review by this Court.

2. There is, we think, additional reason why review should not be granted. The Court of Claims has exercised traditional jurisdiction in certain types of military pay cases, namely, those in which the question presented for decision involved no inquiry by the court into factual and technical questions of basic entitlement committed by statute to the exclusive jurisdiction of the armed services. In the usual case, the court was called upon, on an undisputed set of facts, to determine the meaning of a statute or regulation for the purpose of pay computation. See, *e. g., Tanner* v. *United States,* 129 C. Cls. 792, certiorari denied, 350 U. S. 842; *Commings* v. *United States,* 89 C. Cls. 498.[9] The case of *Lemly* v. *United States,* 109 C. Cls. 760, decided in 1948, marks the first occasion on which the Court of Claims assumed jurisdiction to review and reverse *factual* determinations fixing the basic relationship between a service and its officers, *i. e.,* whether an officer should be retained or separated and, if separated, in what status. Problems of accrual of causes of action, such as that presented here, stem from this assumption of jurisdiction. In our view, there is at least great doubt as to whether the matters which the Court of Claims is now reviewing in this

[9] These cases constitute the so-called continuing claim cases to which petitioner attempts to resort. In a proper continuing claim case, a determination of a question of law in the claimant's favor merely requires that judgment be given for the amount of the monthly payment so determined for the period in suit but not to exceed six years. See, *e. g., Commings* v. *United States, supra.*

area are within its power. The basic relationship between the military services and their officers—retention or separation—is committed by statute to the discretion of the President or the Secretaries. The statutes in this case are illustrative; see R. S. 1245, 10 U. S. C. (1946 Ed.) 931; R. S. 1246–1253, 10 U. S. C. (1946 Ed.) 961–966.[10] Nothing could be more crucial to internal military management than the question, arising in countless cases and in infinitely varied circumstances, of the status of its officers. And it has been repeatedly held that courts are without power to interfere in matters of internal management of military establishments. See, *e. g., Orloff* v. *Willoughby,* 345 U. S. 83, 93; *Denby* v. *Berry,* 263 U. S. 29; *Reaves* v. *Ainsworth,* 219 U. S. 296; *Creary* v. *Weeks,* 259 U. S. 336, 344.

The Court of Claims appears to have recognized this general rule of non-interference by the judiciary in cases involving the question really presented by this case, namely, whether an officer is medically fit or not to serve in the military forces. In *Wales* v. *United States,* 132 C. Cls. 765, the court said (at p. 769):

> The Medical Board found that plaintiff was fit for general military duty at the time of his release by the Secretary to inactive duty. This finding still stands. This court can not under-

[10] These and similar disability retirement statutes have been replaced by Section 402 (a) of the Career Compensation Act of 1949, 63 Stat. 816, 37 U. S. C. 272a. The Career Compensation Act continues the discretionary power of the services to deal with the question of retirement for disability.

take to determine who is fit or unfit to serve in the military forces. *Holliday* v. *United States* [128 C. Cls. 647]. *Beamish* v. *United States,* 130 C. Cls. 767, 128 F. Supp. 158. And, as stated in *Orloff* v. *Willoughby,* 345 U. S. 83:

> * * * judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

We submit that this principle of the *Wales* case completely disposes of this case. Petitioner is asking that a court declare him unfit to serve as an officer, after the Army has called him fit. This a court cannot do.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1956

U. S. GOVERNMENT PRINTING OFFICE: 1956

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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IN THE

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OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that this Court grant a rehearing of its order of December 3, 1956 denying the petition for writ of certiorari herein and issue a writ to review the judgment of the United States Court of Claims in the above entitled case, as prayed for in the petition filed October 1, 1956 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Since this Court's order of December 3, 1956, denying the petition herein, there have been several decisions of the United States Court of Claims under

which the petitioner would be entitled, in large part, to the relief denied him in the instant case. All of these decisions were announced on December 5, 1956, in the cases of *Furlong* v. *U. S.*, C. Cls. No. 324-54 (the opinions are fully set forth in Appendix A herein); *Conlin* v. *U. S.*, C. Cls. No. 230-56; *Levadi* v. *U. S.*, C. Cls. No. 431-55, and *Cannon, et al.* v. *U. S.*, C. Cls. No. 397-52.

Under these recent decisions, the petitioner would receive monthly disability retirement pay from a date six years prior to the filing of his petition in the Court of Claims. Only that part of the life long annuity which had accrued prior to this six year period would be barred. Thus, instead of losing his entire annuity, as the Court of Claims held in petitioner's case, the petitioner would, under the *Furlong* and other cases, lose only a small portion thereof, that which accrued from July 25, 1946 to March 14, 1949. He would be entitled to all pay from March 14, 1949 to the end of his life.

This drastic change is due to the fact that in these recent decisions, Judges Madden and Littleton definitely hold that disability retirement pay is a continuing obligation, that a new cause of action for such pay accrues each month and that only those monthly installments which accrued prior to the six year period are barred (See *Furlong, supra,* Appendix A; *Levadi, supra; Conlin, supra; Cannon, et al., supra*). Chief Judge Jones now holds that the cause of action does not accrue until the matter of entitlement to retirement benefits is "closed" within the Army.

In *Furlong* (Appendix A), Chief Judge Jones held that when, at the time of his separation from active

service, the officer is misled by the Army into believing that he is not permanently incapacitated, but subsequently ascertains that he is and requests reconsideration of his retirement rights, the matter is not "closed" within the Army (and the cause of action does not accrue) until the Army acts upon the request for reconsideration.

Upon the facts of the instant case which were before the Court of Claims on the Government's motion for summary judgment, three judges, constituting a majority of the Court, would now rule for the petitioner. Judges Madden and Littleton would hold that only such portion of petitioner's pay which accrued prior to the six year period was barred. Chief Judge Jones would hold that none of petitioner's pay was barred because the action of the Army on his claim was not "closed" in July, 1946, when his term of active duty ended. He would hold that because petitioner was misled into believing that he might not be permanently incapacitated, his cause of action did not accrue until he learned that he was and the Army denied his request for reconsideration. There was, in the instant case, a double misrepresentation because the Army informed petitioner that he could have a review of his retirement status within the Army and when he requested the review, it was denied him (R. 7-d, 3, 7-f, 7-g; Pet. for Writ of Cert., pgs. 7-8).

Since two judges of the Court of Claims would award recovery from a date six years before the filing of the petition and one judge would award recovery from the time of separation, the petitioner would receive pay for the shorter, six year period, as the Court stated in *Cannon, et al.* v. *U.S., supra,* one of the aforesaid decisions of December 5, 1956:

> "Under Judge Littleton's opinion plaintiffs are entitled to recover only such payments as were due to be paid within six years prior to the filing of the petitions. The Chief Judge and I agree they are entitled to this recovery, but, in addition, we think they are entitled to recover payments becoming due while the Civil Service Commission was considering the matter, since their petitions were filed within six years of the action of the Civil Service Commission. Since only two judges concur in this view, judgment can be rendered only for those payments becoming due within six years of the filing of the petitions, four judges agreeing plaintiffs are entitled to recover this much."

Under the recent decisions, it would be improper to decide, on motion for summary judgment, as the Court did in the instant case, that petitioner's claim was barred. Petitioner would be permitted to present all of his evidence to show that the Army action, at the time of his separation, was not "closed" or final and that he was misled both as to his disability and his right to obtain a review within the Army. In addition to what appears in the limited record upon the motion for summary judgment, the petitioner would show that the Army was not, in fact, certain whether his injuries were permanent because only further lapse of time could prove whether the shattered nerves would regenerate. This uncertainty was the reason for expressly pointing out to the petitioner that his matter could be reviewed at any time within the next five years. Petitioner would show that generally, in gunshot or shrapnel wounds damaging or destroying nerve, bone, muscle or tissue, it was impossible for doctors to determine, at time of demobilization, to what extent there would be regeneration.

The December 5th decisions of the Court of Claims evidence not only a drastic change in the position of the Court upon facts such as in the case at bar. They demonstrate that, on various aspects of the statute of limitations, the Court has fallen into even greater confusion and uncertainty than existed at the time the petition herein was filed (See Pet. for Writ of Cert., pgs. 14-20).

In previous cases Judges Madden and Littleton held that the cause of action does not accrue at the time of separation, but only after a determination of the basic facts by one of the administrative tribunals (*Uhley* v. *U.S.*, 128 C. Cls. 608, 128 F. Supp. 674, 1954; *Capps* v. *U.S.*, 137 F. Supp. 721, C. Cls. 1956). They now hold that it accrues on separation from active service, before any determination by such a tribunal.

Whereas Chief Judge Jones previously held that the cause of action accrued upon the decision of a Retiring Board, he now holds that this is only true when an officer has been misled at the time of separation. Whereas Judge Laramore has indicated, at least in one opinion, that the cause of action only accrues after the determination of an administrative tribunal (*Holt* v. *U.S.*, C. Cls. 353-52, April 3, 1956) he now holds that it accrues at the time of the officer's separation from active service before any determination.

Thus, the general confusion described in the Petition for Writ of Certiorari has now been compounded by the December 5th decisions of the United States Court of Claims. Only this Court can now resolve the conflict in the Court of Claims and clarify the law.

CONCLUSION

For the aforesaid reasons, plaintiff requests that the Court rehear its order denying the Petition for Writ of Certiorari herein and upon such rehearing either:

1. Remand this case to the United States Court of Claims with direction to determine whether under its decisions of December 5, 1956, plaintiff is entitled to relief; or,

2. Issue a Writ of Certiorari to the United States Court of Claims.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58-2 of the Rules of this Court.

PAUL R. HARMEL,
MICHAEL A. SCHUCHAT,
Attorneys for Petitioner.

In the United States Court of Claims

No. 324–54

(Decided December 5, 1956)

JOHN A. FURLONG v. THE UNITED STATES

Mr. John Geyer Tausig for the plaintiff.

Mr. Francis X. Daly, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS AMENDED PETITION

LITTLETON, *Judge*, delivered the following opinion:

Plaintiff, a former Army reserve officer, brought this suit to recover disability retirement pay from July 18, 1946 to date, less disability compensation received from the Veterans Administration. The petition was filed August 5, 1954, and the case comes before the court on defendant's motion to dismiss plaintiff's petition, as amended, on the ground that the plaintiff's claim, if any, is barred by the statute of limitations.[1]

On September 12, 1945, plaintiff, while serving on active duty with the United States Army in the Philippines, was

[1] 28 U. S. C. 2501 provides in pertinent part: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition is filed * * * within six years after such claim first accrues."

Defendant's motion states as follows: "Defendant moves to dismiss plaintiff's petition, as amended, on the ground that the Court does not have jurisdiction thereof since it appears on its face that the claim sued on first accrued more than six years prior to the filing of plaintiff's petition, as amended, and is now barred by the statute of limitations."

In its conclusion in its brief in support of its motion, the defendant makes this statement: "Since there is no clear showing in plaintiff's petition of arbitrary or capricious action on the part of the Secretary of War, or any of his subordinate officials, plaintiff's petition does not state a cause of action within the jurisdiction of this Court and it should therefore be dismissed."

The motion itself does not include this ground for dismissal and as a result will not be considered by this court in rendering its opinion.

injured when struck in the abdomen by a bullet which came through the canvas of his tent quarters. Attempts made by the Army doctors to remove the bullet were unsuccessful and the bullet has remained in the plaintiff's hip to this day. On July 18, 1946, the plaintiff was separated from the service not by reason of physical disability. Immediately prior to this separation plaintiff was examined at Lovell General Hospital, Camp Devens, Massachusetts, for the purpose of determining whether an operation should be performed to remove the bullet from his body. The medical officers at the hospital decided not to perform the operation and plaintiff sought their advice as to whether he should appear before a Medical Disposition Board and an Army Retiring Board. He was informed by the doctors that his disabilities were not sufficient to make him eligible for retirement benefits. Shortly thereafter on July 18, 1946, plaintiff was separated from military service not by reason of physical disability, with the rank of major.

Following his separation, plaintiff's physical condition grew worse and on January 3, 1947, he sought the advice of the Reserve Officer's Association as to whether, in the opinion of the association, it would be possible for him to appear before an Army Retiring Board. Plaintiff's request for permission to appear before the Board was forwarded by the association to the Adjutant General of the Army. On February 5, 1947, plaintiff was informed that his request would be given consideration if he submitted evidence which would justify his appearance before the Board. Plaintiff submitted evidence along this line and on March 22, 1948, he was directed to enter Murphy General Hospital, Waltham, Massachusetts, for physical evaluation preliminary to an appearance before an Army Retiring Board. Plaintiff entered the hospital on August 3, 1948, which was two years after his release from active duty. On August 6, 1948, the Retiring Board found that plaintiff was not at that time permanently incapacitated for active duty. This decision was approved by the Secretary of War on September 2, 1948.

It is plaintiff's position that an honest evaluation of his case by Army authorities would have resulted in his having been declared eligible for the retired benefits provided for by

statute, but that he was deprived of such statutory benefits by the arbitrary, capricious and unsupported findings and decision of the Army.

Defendant has moved to dismiss the petition on the ground that plaintiff's claim, on which he bases his suit, accrued upon his separation from the service on July 18, 1946, without retirement benefits, and is therefore beyond the six-year statute of limitations applying to claims filed in this court.

We must assume, for the purposes of defendant's motion, that the Army violated the law when it released plaintiff from the service without retirement benefits provided for by applicable statutes and that plaintiff has a claim against the United States founded upon an act of Congress, 28 U. S. C. 1491 (2). We therefore, at this time, need only decide whether plaintiff's claim, as defendant contends in his motion, is barred by the statute of limitations.

The retirement pay for which plaintiff sues is, in effect, an annuity due and payable periodically upon the last day of each month during retirement. Suits involving claims for periodic compensation involve multiple causes of action and are continuing claims. The liability on the part of the Government arises each time it fails to make payment when it is due, as required by statute. Upon each occasion that a payment is withheld a new cause of action upon such claim accrues to the plaintiff, and only those claims for installments which were due and payable more than six years before the filing of the petition are barred by the statute of limitation of six years.

This rule is supported by a number of decisions of this court and the Supreme Court. In the early case of *Bachelor* v. *United States*, 8 C. Cls. 235, the plaintiff sued for compensation, paid annually on the fiscal year basis, which was withheld from him by the Treasury. Some of the years for which compensation was claimed fell within and part without the six-year period provided for in the statute of limitations. This court, in speaking of the statute of limitations, said:

> * * * But when the office, as in this case, is continued for more than one year, and the compensation payable annually, the statute, as in the case of a debt payable at

> several times, that is, by installments, begins to run from the end of each fiscal year, and cuts off all compensation not falling due within six years before the institution of the suit. * * *

The *Bachelor* case was followed in *Ellsworth* v. *United States*, 14 C. Cls. 382, which decision was affirmed by the Supreme Court in *United States* v. *Ellsworth*, 101 U. S. 170. In *Watson* v. *United States*, 21 C. Cls. 511, a retired Army officer sued for longevity pay which had been denied him by the Army more than six years preceding the filing of his petition. The Government's demurrer was sustained as to that part of plaintiff's claim which had accrued more than six years prior to the filing of the petition, and overruled as to the balance. The Supreme Court affirmed the decision of this court in *United States* v. *Watson*, 130 U. S. 80, saying:

> * * * We also concur with the Court of Claims, that in this case there can be no recovery for any part of the claim that accrued prior to February 24, 1880, the day when the bar of the Statute of Limitations took effect. * * * The claim sued on is valid as to that part of it which accrued after that date.

Some of the many other cases in which we have followed this rule are *Hornblass* v. *United States*, 93 C. Cls. 148; *Hermann* v. *United States*, 113 C. Cls. 54; *Pacific Maritime Association* v. *United States*, 123 C. Cls. 667.

Although some of the recent decisions of this court are to the contrary, we are of the opinion upon further consideration of the question that the above-stated doctrine is the correct one and that it provides a rule to which this court should adhere in claims of this type.

In the instant case, plaintiff was, as we have said, separated from the service on July 18, 1946. Under the allegations of plaintiff's petition, which, for the purpose of the motion, we must accept as true, he should have been retired on that date for disability incurred as an incident of the service while on active duty and should have been awarded disability retired pay. Presumably his first installment of such pay was due and payable to him on July 31, 1946, and monthly thereafter. Since plaintiff's petition was filed in this court on August 5, 1954, all installments of retired pay claimed

which were due and payable, and therefore first accrued, after July 31, 1948, are not barred by the statute of limitations, while all installments due and payable prior to July 31, 1948, are forever barred by the statute.

The defendant's motion will be granted as to plaintiff's claim for those installments of disability retired pay due and payable from July 18, 1946 to July 31, 1948, and will be overruled as to all payments due and payable from and after July 31, 1948.

It is so ordered.

MADDEN, *Judge*, concurs.

JONES, *Chief Judge*, delivered the following opinion:

I concur with the opinion by Judge Littleton in so far as it denies in part and grants in part the defendant's motion to dismiss. What places this case in a somewhat different light from that usually encountered in the disability retired pay cases is the fact that unlike those cases, plaintiff's separation and initial appearance before the Army Retiring Board did not occur as part of the same transaction.

He was separated in 1946, but he did not appear before the retiring board until 1948. He alleges that his failure to appear before the board at the time of his separation was due to the fact that he was misled by the defendant's medical officers who examined him at that time; that when he suggested that he should appear before a Medical Disposition and an Army Retiring Board they informed him that his disabilities were insufficient to make him eligible for retired pay or, if so, were not of a permanent nature; that as a result he was separated from the service as a major physically fit for active duty, but that after several months of treatment and disappointment it became apparent that plaintiff's condition would never improve and that he was permanently incapacitated and physically unfit for active duty.

If plaintiff was thus misled, then I am of the opinion that the question of his entitlement to retirement benefits did not become closed in so far as the Army was concerned until September 2, 1948, on which date the Secretary of the Army approved the findings of the Army Retiring Board which denied him disability retired pay.

I would deny the Government's motion and permit plaintiff to go to trial with the opportunity to show, first, whether he was in fact misled, and, second, whether the retiring board's decision against him was the result of arbitrary or capricious action.

WHITAKER, *Judge*, delivered the following opinion:

I agree with the Chief Judge that plaintiff's cause of action did not accrue until September 2, 1948, which was the date the Secretary of the Army approved the action of the retiring board denying plaintiff disability retired pay.

Ordinarily the time for an officer to make application to go before a retiring board is before he is separated from the service, but there is no requirement that he do so then or not at all. See *Updike* v. *United States*, 132 C. Cls. 627; *Steen* v. *United States*, No. 217–53, decided June 5, 1956; *Palluconi* v. *United States*, No. 420–54, decided June 5, 1956; *Charles Edward Vaughn* v. *United States*, No. 355–54, decided July 12, 1956. Plaintiff did not do so and was separated not for physical disability.

This did not give him a right of action in this court, because Congress has vested in a retiring board and the Secretary of the service concerned jurisdiction to determine an officer's right to disability retired pay. We can never acquire jurisdiction of an officer's claim to retired pay until this board and the Secretary have acted or have refused to act. It is then that an officer's right of action in this court first accrues. The acts conferring jurisdiction on this court require that the suit must be brought within six years from this time.

Plaintiff's cause of action, therefore, accrued on September 2, 1948, the date the Secretary approved the action of the retiring board. Plaintiff's petition was filed within six years thereafter.

I agree with the Chief Judge that plaintiff should be permitted to go to trial with the opportunity to show whether the retiring board's decision against him was the result of arbitrary or capricious action.

LARAMORE, *Judge*, dissents.

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